Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules And Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90

TEXAS OFFICE OF PUBLIC UTILITY COUNSEL COMMENTS

The Texas Office of Public Utility Counsel submits these comments in response to the Federal Communication Commission's September 18, 2002 *Notice of Proposed Rulemaking and Memorandum Opinion and Order*. The Texas Office of Public Utility Counsel (TOPUC) represents residential and small business consumers in telephone proceedings before the Public Utility Commission of Texas, the Federal Communications Commission (FCC) and in various state and federal courts.

I. INTRODUCTION

The *Notice* requests comments on whether the 1991 Telephone Consumer Protection Act (TCPA) rules need to be revised to reflect the significant changes in telemarketing practices that have occurred since 1991. Specifically, the Federal Communications Commission (FCC or the Commission) proposes to revise rules governing telemarketers' use of autodialers, prerecorded or artificial voice messages, and facsimile machines. The FCC also seeks comment on the effectiveness of company-specific do-not-call lists and the establishment of a national do-not-call registry for consumers who do not want to receive telemarketing calls.

TOPUC is supportive of the Commission's effort to clarify and revise the 1991 TCPA rules. As noted by the Commission, the growth in the number of telemarketing calls, along with the increased usage of various technologies to contact consumers, have

resulted in substantial inconvenience and safety concerns for consumers who receive unsolicited telemarketing calls and unsolicited advertisements by facsimile machines. The current TCPA rules do not protect consumers from the ever continuing and increasing intrusions on customer's privacy that may result from telemarketing activities. The Commission should implement stronger rules that restrict the utilization of predictive dialers and autodialers, and prohibit telemarketers from blocking consumer's Caller ID. The TCPA's current definition of "established business relationship" is far too broad, and should be amended so that customers have further protection from unwanted telemarketing calls. Finally, the Commission should establish a national do-not-call registry in conjunction with the Federal Trade Commission. The registry should not preempt existing state do-not-call registries. Registration procedures for the national do-not-call list should be easy and convenient for those consumers who want their telephone number included on the registry.

II. COMPANY SPECIFIC DO-NOT-CALL LISTS

The Commission seeks comment on the overall effectiveness of the company specific do-not-call approach in providing consumers with a reasonable means to curb unwanted telephone solicitations. For consumers who wish to continue to receive telemarketing calls, company specific do-not-call lists are probably the most effective way for these consumers to control the volume and type of telemarketing solicitations received. While TOPUC does not recommend that the company specific approach remain the only type of do-not-call list available at the federal level, the company specific approach should be retained even if the FCC adopts a national do-not-call list. However, the Commission notes other problems associated with the company specific do-not-call lists, primarily the existence of many "hang up" or "dead air" calls that result from

predictive dialing and answering machine technology. These "dead air" abandonment calls are not only inconvenient and harassing for the consumer, they may also interfere with Internet usage and tie up telephone lines for people working from their homes. Also, it is impossible for consumers to identify the caller and request to be put on a do-not-call list.

The Commission should adopt rules that require telemarketers to bring their abandonment rates as close to zero as possible. These rules should apply to all automated dialing technologies. The Commission also asks whether it should adopt the FTC proposal regarding abandoned calls. The FTC maintains that telemarketers who abandon calls are violating § 310.4(d) of the Telemarketing Sales Rule. The rule states that when a consumer answers a telemarketing call, the telemarketer is required to disclose identifying information to the consumer. If a predictive dialer abandons a call after the consumer answers the telephone, the telemarketer is violating the Telemarketing Sales Rule. TOPUC supports the adoption of this conclusion by the Commission. Thus, instead of the dead air space that often results from predictive dialers, a prerecorded mechanism should be put in place that provides the consumer with a prerecorded voice message giving the disclosures required by the FTC's proposed rule.[1] The prerecorded voice message should be kept as brief as possible, however, to limit the intrusion as much as possible. In order to address the problem of consumers not being able to contact telemarketers who abandon calls, all telemarketers should be required to transmit call ID information. Additionally, no telemarketers should be allowed to block the transmission of Caller ID numbers to the customer. Consumers should be able to call the number

[1] These disclosures include the identity of the call, that the purpose of the call is to sell goods or services, the nature of the goods or services, and that no payment or purchase is necessary to participate in a prize or promotion. FTC NPRM, 67 Fed. Reg. at 4543.

transmitted and decide whether they want to be on that particular telemarketer's do-not-call list. However, this requirement will not help consumers who do not have Caller ID. An alternative solution would be for the Commission to require the prerecorded message to include a phone number where the telemarketer can be contacted, in addition to the four disclosures required by the proposed FTC rule.

The Commission asks whether some restrictions should be put on autodialers and predictive dialers to reduce the number of abandoned calls. The Commission notes that the Direct Marketing Association has recommended that its members voluntarily abide by a 5% abandonment rate on calls and limit the number of abandoned calls to the same caller to no more than twice a month. However, a 5% abandonment rate per telemarketer with two abandoned calls per month may still result in numerous abandoned calls for consumer, and because the guidelines are voluntary, no telemarketer is required to follow them. The Commission should adopt rules to reduce the number of abandoned calls from an automated dialing system to the same telephone number no more than once every 180 days.

Finally, the Commission asks whether 10 years is a reasonable length of time for companies to honor do-not-call requests and asks for comments regarding a reasonable length of time for telemarketers to process do-not-call requests. Ten years is a reasonable length of time to honor do-not-call requests. Telemarketers should be required to process do-not-call requests no longer than eight weeks after the request is made.

III. ARTIFICIAL OR PRERECORDED VOICE MESSAGES

The Commission seeks comment on artificial or prerecorded messages that contain offers of free goods or services, and messages that offer "information only" about products. The Commission asks whether such calls should be prohibited without the

prior express consent of the called party. The Commission notes the ultimate intent of these calls is to generate future sales. These types of calls should be included under the TCPA and Commission rules that prohibit the transmission of unsolicited advertisements, and therefore should be prohibited without the prior express consent of the called party. Telemarketers are in the business to generate revenues and profits, and it is logical to assume that no reasonable telemarketer is going to offer free goods and services to consumers without subjecting them to further sales pitches.

IV. ESTABLISHED BUSINESS RELATIONSHIP

The TCPA permits an "established business relationship" exemption from the restrictions on artificial or prerecorded calls to residences. The term "established business relationship" has been defined by the Commission as a prior or existing relationship formed by a voluntary two way communication between a person or entity and a residential subscriber on the basis of inquiry, application, purchase or transaction by the residential subscriber regarding products or service offered by such person or entity. The Commission seeks comment as to whether to clarify the type of customer inquiry that would create an established business relationship and seeks comment of whether a do-not-call request should be honored when the customer continues to do business with the entity making the solicitation.

The Commission should narrow the definition of "established business relationship" to include only situations where an actual purchase or transaction is completed and should specifically exclude mere inquiries or surveys. There is no reason for a customer who merely inquires about a product or service, or answers a survey, to be

subject to future telemarketing calls.[2] Additionally, in order to be considered "established," the Commission rules should specify that the relationship must be ongoing. To qualify as "ongoing," the customer must have completed a purchase or transaction with a specific company within 24 consecutive months prior to the call.

Furthermore, a company should be required to honor do-not-call requests even if the customer continues to do business with the company. It should not be assumed that an established business relationship necessarily implies that a customer wishes to receive further telemarketing solicitations from that business.

V. FASCIMILE ADVERTISEMENTS

The TCPA prohibits the sending of unsolicited advertisements to telephone facsimile machines. The Commission requests comment as to whether the publishing or distribution of facsimile numbers by individuals and businesses constitutes an invitation to receive unsolicited faxes. The Commission also asks if an established relationship precludes the transmission of unsolicited faxes about different products or services.

The mere publication of a fax number should not be an invitation to send unsolicited advertising. Businesses most likely publish their fax numbers for the convenience of their customers, clients and other trade association members, and not for the benefit of telemarketers. Additionally, companies that have a relationship with a customer based on one type of product or service should not be allowed to send unsolicited faxes about different services or products. For a multi-product or multi-service company, the transmission of unsolicited faxes about other products could result in an endless barrage of annoying faxes to customers.

[2] Future telemarketing calls would, for instance, be allowed if the customer answers a survey and indicates he would like to know more about the good or service.

VI. WIRELESS TELEPHONE NUMBERS

TCPA and Commission rules prohibit telephone calls using an autodialed or prerecorded voice to any telephone number assigned to a paging service, cellular telephone service, or any service for which the called party is charged for the call, except in emergencies or with the prior express consent of the called party. The Commission seeks comment on whether wireless phones are considered "residential telephone numbers" and if so, should there be any different rules that apply to solicitations to wireless telephone numbers than already apply under 47 CFR § 64.120 (e).

The Commission should prohibit all commercial telemarketing calls to wireless phones unless specifically authorized by the subscriber, regardless if the called party is charged for the call or not. Given the fact that wireless telephone numbers are unlisted, the Commission should consider unsolicited telemarketing calls to wireless phones to be an invasion of privacy.

VII. NATIONAL DO-NOT-CALL REGISTRY

The Commission seeks comment on whether to revisit its prior determination not to adopt a national do-not-call list. TOPUC agrees with the Commission that the time is ripe to revisit this issue. Given the proliferation of telemarketing calls over the last 10 years, the increased usage of telemarketing autodialing technology, and the enormous growth of consumer complaints regarding telemarketers, a national do-not-call registry is the most effective way for consumers to shield themselves from constant unsolicited telemarketing calls. As noted by the Commission, a national list might be less burdensome for the telemarketers, who, under the company-specific approach, must retain do-not-call records for a period of ten years. More importantly, a national list would definitely be less burdensome for consumers who do not want to receive any

unsolicited telemarketer calls. Consumers will no longer have to expend the time and energy notifying individual telemarketing companies in order to be put on a do-not-call list.

The Commission should adopt rules for a national do-not-call registry that are consistent with many of the proposals of the FTC. Because the FTC plans to complete its rulemaking by the end of 2002, there is ample opportunity for the Commission to review the FTC rules and resolve any inconsistencies. The national do-not-call registry should also work in conjunction with existing state do-not-call programs.

The Commission seeks suggestions on how to inform consumers of the existence of a national do-not-call list. Undoubtedly, many newspapers, magazines and other periodicals will publish information relevant to the national registry. Also, the federal government issues pamphlets on various consumer issues, and the existence of a national registry would most likely be included in the information packets. Both the FCC and the FTC should develop a comprehensive information program to publicize the existence of the national do-not-call registry.

Additionally, telemarketers should be required to publicize information about the registry. For instance, when consumers call or notify specific telemarketers that they do not want to receive further sales calls, the telemarketer should be required to notify the subscriber of the national do-not-call registry. This notification should include a reference to an FCC website and toll free telephone number where additional information can be found. Finally, the Commission should require information about the national do-not-call registry to be provided to consumers at enrollment and information should also be provided in telephone directories.

If the customer wishes to be placed on the national registry, the enrollment

process should be as easy and as convenient as possible. The TCPA prohibits the Commission from charging residential consumers for being included in the national database. This prohibition should also extend to the utilization of non-toll free numbers to be placed on or removed from the registry. In other words, consumers should not be charged any toll fees if they decide to register over the telephone. The Commission notes that the FTC proposal does not specify whether consumers will be charged a fee for including their names on the national do-not-call database. Although this may cause some confusion to consumers and telemarketers, there is ample opportunity to explain the differences in the two registries in the Commissions consumer information program. For instance, the FTC rules may allow some businesses and wireless phone subscribers to register on the do-not-call list, whereas the TCPA only grants authority for the Commission to establish a database for residential subscribers. Undoubtedly, registration on the FCC database will be sufficient for most residential subscribers, and this information should be relayed to the consumer through the FTC's and FCC's consumer information program.

Several methods should be available for registration on the national registry. Consumers should be able to register by calling a toll-free number and should be able to access a computer website for online enrollment (and information) purposes. Additionally, consumers should be able to register through the mail.

The Commission's rules should require a total prohibition against telemarketing calls for customers who register on the national do-not-call list unless the customer provides express verifiable authorization to the seller or telemarketer. The Commission should adopt the FTC's record keeping requirements that must be met before companies may call customers on the do-not-call registry.

The Commission notes that the FTC proposes to establish a do-not-call registry for a two-year period, after which it may review the costs and benefits of the registry. The Commission seeks comment on whether it should commit to a similar review at the same time. The Commission should certainly review the costs and benefits of a national do-not-call registry, but should consider doing so after a three- or four-year period. A two-year trial period may not be sufficient time to provide the Commission with enough data to adequately assess whether the goals of the national registry are being attained at a reasonable cost. If the Commission decides to establish a joint database with the FTC, and the FTC decides to terminate the database after two years, then the Commission should consider implementing rules which allow for the continuation of the registry without FTC participation.

The Commission seeks comment on how a national registry should operate in conjunction with current and future state registries. State do-not-call requirements that provide consumers with greater protection against telemarketers should not be preempted by the Commission's rules. As noted by the Commission, the Attorneys General of all 50 states have indicated that they have enforced their own do-not-call laws against telemarketers irrespective of whether such calls are interstate or intrastate in nature. Currently, 21 states either have state do-not-call lists in effect or are implementing do-not-call database systems, and an additional 15 states have pending legislation concerning do not call registries. Obviously, this issue is of great concern to the individual states, and the Commission should implement rules to ensure that telemarketers comply with state law and state registries continue to operate.

The Commission seeks comment on whether the state and national data registries should share databases. Specifically, if consumers register on both databases, should the

federal database permit states to submit do-not-call requests from their own database, or should the states be allowed to obtain from the federal database any requests from their own state? Both options should be required. The TCPA already requires states to include in their database any do-not-call requests from their states that are found in any national database. Correspondingly, the federal database should also permit states to submit their own do-not-call requests to the federal registry.

Respectfully submitted,

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